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PP v. YIP KOK WAI & ORS

HIGH COURT MALAYA, SHAH ALAM
ASLAM ZAINUDDIN J
[CASE NO: BA-43-4-02-2024]
8 MAY 2024

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Abstract – *A visit to the locus in quo could assist a judge in arriving at the truth, by giving the judge a better visualisation of the scene of an offence and fuller understanding on how the offence was committed. Hence, in a circumstance where it could be shown that a visit to the locus in quo could truly assist the judge, an application for it should be allowed by the court.*

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CRIMINAL PROCEDURE: *Revision – Application for – Locus in quo – Principles and procedures – Whether Sessions Court Judge ('SCJ') erred in refusing to allow application to visit locus in quo – Whether application ought to be allowed – Whether site visit would enable SCJ to better visualise scene of offence and better understand how offence was committed, thus, assisting her in arriving at truth*

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Pursuant to the Sessions Court Judge's ('SCJ') decision to dismiss the prosecution's application to visit the *locus in quo*, the court decided to exercise its powers of criminal revision under s. 323 of the Criminal Procedure Code, to satisfy itself as to the correctness, legality and propriety of the SCJ's decision. Considering that such application was seldom made, either in the subordinate courts or the High Courts, the court decided that it was opportune to deliberate on the case law and procedures pertaining the same.

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Held (setting aside SCJ's decision; allowing prosecution's application to visit *locus in quo*):

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(1) Pursuant to the English law, a judge may decide to exercise his powers to view the scene of the crime or other place relevant to the case or of some object, person or animal which cannot conveniently be brought to court. A view may involve any appropriate test or demonstration, as if it is made in court. It is important that all interested parties and their legal representatives be given an equal opportunity to observe, especially the accused. The judge must be present at the place where the observation takes place. Case laws suggest that a judge can view a place if: (i) the trial had begun; and (ii) the place has a permanent feature. Hence, for merely temporary features, such as the position of marks on the road, or of the body of a deceased person, this power cannot be invoked. (para 8)

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(2) On return to court any witness (including an accused who has given evidence) should, if the prosecution or defence so require, be recalled for examination or cross-examination in respect to any place mentioned

in his evidence or indicated by him at the view. Nothing which has any bearing on the case should be said to the judge save in the presence of the prosecutor, the accused and his counsel (if any). If anything is said which goes beyond what is reasonably necessary in indicating a place referred to or implied in the evidence and which might be regarded by the judge as evidence, the person (unless he is an accused who has not given evidence) should be called or recalled for examination or cross-examination on the point on return to court. (para 9)

(3) The whole purpose of a view is to enable the judge to follow the evidence given in court and to help him arrive at the truth. However, it is not safe to lay down any rigid rule for the conduct of a view. Something must be left to the judge's discretion and so long as everything said or done is said or done openly in the presence of the accused and his counsel and is interpreted to the accused, if necessary, and so long as any new matter or new aspect arising during the view is tested by examination or cross-examination on return to court, there would be no irregularity in the trial nor would there be any ground for suspecting that justice did not appear to be done. (para 9)

(4) The SCJ's decision to refuse the application to visit the *locus in quo* was set aside. This was to enable the SCJ to follow the evidence given in court, to better visualise the scene of the offence and to help her arrive at the truth so that justice could be served. The SCJ must also ensure that the accused persons were allowed to recall and cross-examine any witnesses regarding any new evidence, if any, which emerged, emanated or ensued from the site visit. (para 15)

Case(s) referred to:
Goh Ah San & Ors v. The King [1938] CLJU 21; [1938] 1 LNS 21 HC ***(refd)***
Lee Boon Tuan v. PP [1960] CLJU 52; [1960] 1 LNS 52 HC ***(refd)***
Manager, Tuborg (M) Sdn Bhd v. PP [1990] 1 CLJ 790; [1990] 2 CLJ (Rep) 441 HC ***(refd)***
Manokaran & Anor v. PP [1978] CLJU 118; [1978] 1 LNS 118 HC ***(refd)***
Olivia Chong Oi Yun v. PP [2020] 4 CLJ 246 HC ***(refd)***
PP v. Siti Aisyah & Anor And Another Case [2019] 10 CLJ 660 HC ***(refd)***
Rex v. Lee Ah Phua & Ors [1950] CLJU 74; [1950] 1 LNS 74 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 31, 35, 36
Criminal Procedure Code, ss. 323, 325, 326

Other source(s) referred to:
The Criminal Procedure Code: A Commentary with Appellate Practice & Procedure, 3rd edn, Sweet & Maxwell, pp 61-62

For the prosecution - Shahrul Ekhsan Hasim; DPP
For the respondents - M Reza Hassan, Diong Pei Jing & Nur Adilah Nabilah; M/s Raja Riza & Assocs

Reported by Syamim Ariffin

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JUDGMENT

Aslam Zainuddin J:

[1] I have called for and examined the record of these proceedings in the Sessions Court at Selayang in the exercise of my powers of criminal revision under s. 323 of the Criminal Procedure Code for the purpose of satisfying myself as to the correctness, legality and propriety of the order made to refuse an application by the prosecution to visit the *locus in quo*. Since an application to visit the scene is rarely made in our courts, either in the subordinate courts or even in the High Courts, it is opportune, apposite and apt for me to touch on the case law and procedure in going about the matter.

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The Law On Revision

[2] The Criminal Procedure Code ("CPC") states:

> 323. Power to call for records of Subordinate Courts
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> (1) A Judge may call for and examine the record of any proceeding before any subordinate Criminal Court for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of that subordinate Court

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> (2) Orders made under sections 97 and 98 are not proceedings within the meaning of this section.

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[3] This provision must be read together with ss. 31, 35 and 36 of the Courts of Judicature Act 1964, which confers and amplifies the powers and jurisdiction of the High Court in the exercise of its revisionary powers.

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[4] Section 31 of the Courts of Judicature Act 1964 states:

> The High Court may exercise powers of revision in respect of criminal proceedings and matters in subordinate courts in accordance with any law for the time being in force relating to criminal procedure.

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> General supervisory and revisionary jurisdiction of High Court
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> 35. (1) In addition to the powers conferred on the High Court by this or any other written law, the High Court shall have general supervisory and revisionary jurisdiction over all subordinate courts, and may in particular, but without prejudice to the generality of the foregoing provision, if it appears desirable in the interests of justice, either of its own motion or at the instance of any party or person interested, at any stage in any matter or proceeding, whether civil or criminal, in any subordinate court, call for the record thereof, and may remove the same into the High Court or may give to the subordinate court such directions as to the further conduct of the same as justice may require.

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> (2) Upon the High Court calling for any record as aforesaid all proceedings in the subordinate court in the matter or proceeding in question shall be stayed pending further order of the High Court

Discretion of Court as to hearing parties

36. Subject to any written law for the time being in force no party shall have any right to be heard before the High Court when exercising its powers of revision and supervision:

Provided that no final order shall be made to the prejudice of any person unless the person has had an opportunity of being so heard.

[5] The CPC in s. 325 states as follows:

Powers of Judge on revision

(1) A Judge may, in any case the record of the proceedings of which has been called for by himself or which otherwise comes to his knowledge, in his discretion, exercise any of the powers conferred by sections 311, 315, 316 and 317 of this Code.

(2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard, either personally or by advocate, in his own defence.

(3) Nothing in this section shall be deemed to authorize a Judge to convert a finding of acquittal into one of conviction.

[6] Section 326 of the CPC states:

No party has any right to be heard, either personally or by advocate, before a Judge when exercising his powers of revision:

Provided that the Judge may, if he thinks fit, when exercising such powers hear any party, either personally or by advocate, and that nothing in this section shall be deemed to affect subsection 325(2).

[7] In *Manokaran & Anor v. PP* [1978] CLJU 118; [1978] 1 LNS 118; [1979] 1 MLJ 262, Abdoolcader J held:

I have however not only extensive powers of revision in criminal proceedings under the provisions of section 325 of the Criminal Procedure Code but even wider powers conferred by section 35 of the Courts of Judicature Act, 1964, and the Deputy Public Prosecutor agrees that in a case like this where there is an appeal against conviction on a plea of guilty it is open to me to deal with the conviction in the exercise of my powers of revision if the circumstances of the case so warrant. I would merely add that in my view notwithstanding the provisions of section 305 of the Criminal Procedure Code an appeal against a conviction on a plea of guilty will still lie if the charge discloses no offence in law, in which event the conviction itself would be illegal and a nullity.

Locus In quo

[8] In the book *The Criminal Procedure Code: A Commentary with Appellate Practice & Procedure* (3rd edn, Sweet & Maxwell), it is said at pp. 61-62:

This phrase means "place in which" or "scene of the event" (*R v. Hunter* [1985] WLR 613). According to *Black's Law Dictionary* (9th edn), it means: "The place where something is alleged to have occurred". A *locus in quo*

may either be a simple view of an object or place or a view with witnesses in attendance and giving oral evidence or demonstration. In the first case, no evidence need be recorded but evidence should have been recorded in the second case in respect of words spoken by the witness (*Tameshwar & Anor v. R* [1957] AC 476 per Lord Denning; *Manager, Tuborg (M) Sdn Bhd v. PP* [1990] 2 CLJ (Rep) 441).

A judge may decide to exercise his powers to view the scene of the crime or other place relevant to the case or of some object, person or animal which cannot conveniently be brought to court. A view may involve any appropriate test or demonstration, as if it is made in court. Under the CPC there is no express provision which confers power on the trial judge to view the scene of the crime. It appears that the courts have invoked the approach of the English law on the matter. The practice of holding views has been common in England and elsewhere for many years. In *London General Omnibus Co v. Lavell* [1901] 1 Ch 135 at 138, Lord Alverstone said:

> ... a very undesirable and erroneous practice might grow up with reference to the viewing or seeing by the judge of the subject-matter of the action ... I should be very sorry to endorse the idea, that a judge is entitled to put a view in the place of evidence. A view, as I have always understood, is for the purpose of enabling the tribunal to understand the questions that are being raised, to follow the evidence, and to apply the evidence.

It is important that all interested parties and their legal representatives be given an equal opportunity to observe, especially the accused (*R v. Ely Justices, Ex parte Burgess* [1992] 157 JP 484). The judge or the magistrate must be present at the place where the observation takes place. In *R v. Hunter* [1985] 1 WLR 613; [1985] 2 All ER 173, the conviction of the accused was quashed as the judge permitted all involved in the trial to go on a view, but felt it unnecessary to attend himself. Boreham J, delivering the judgment of the court, held (at 44):

> The judge should be present at every stage of the trial. A view is a stage of the trial. Whether or not a witness is present, in our judgment the judge should always be present.

Case law also seems to suggest that a judge can view a place, provided: (1) the trial had begun; and (2) that the place has a permanent feature. In *R v. Lee Ah Phua* [1950] MLJ 54, Murray-Aynsley CJ held that:

> A view should only be used for the purpose of examination of what may be called the permanent features of the place. For merely temporary features such as eg those indicated in the present case, or in other cases, the position of marks on the road, or of the body of a deceased person, full use should be made of plans and photographs coupled with the oral evidence of reliable witnesses.

In *PP v. Sarjit Kaur Najar Singh* [1998] 5 CLJ 609, HC, the accused was charged with murder of her husband. The prosecution in this case made an application to view *locus in quo* of the incident wherein the court adjourned the case and went to the deceased's house, ie where the body was found. Visu Sinnadurai J in this case also held that:

> At the request of the DPP, this court adjourned to view the *locus in quo* of the incident, *ie*, the house where Marid was killed. The law governing the view of the *locus in quo* is as follows: (i) a view is part of the evidence; (ii) the judge must take a view in the presence of both parties; or both parties must be given the opportunity of being present; the only exception is where the judge goes to see some public place, eg the scene of a road accident; and (iii) the judge should not attend anything in the form of a demonstration or reconstruction in the absence of the parties (see *Parry v. Boyle* [1986] 83 Cr App R 310].
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> A witness who has already given evidence may attend a view, provided that he or she is available to be recalled for further cross-examination, if necessary (*Karamat v. R* [1956] 2 WLR 412; [1956] AC 256; [1956] 1 All ER 415; (1956) 40 CrAppR 13 1.

[9] In the case of *Goh Ah San & Ors v. The King* [1938] CLJU 21; [1938] 1 LNS 21; [1938] 1 MLJ 95; it was held:

> A view should be conducted in the presence of the accused and his counsel, if he has one. The Magistrate can ask any witness in the presence of the accused and his advocate (if any) to point out any place referred to in his evidence or at which any event deposed to by him took place. If the accused has given evidence or made a statement he may be asked to point out places mentioned or involved in his evidence or statement.
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> On return to Court any witness (including an accused who has given evidence) should, if the prosecution or the defence so require, be recalled to be examined or cross-examined in respect to any place mentioned in his evidence or indicated by him at the view.
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> Nothing which has any bearing on the case should be said to the Magistrate save in the presence of the prosecutor, the accused and his counsel (if any).
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> If anything is said which goes beyond what is reasonably necessary in indicating a place referred to or implied in the evidence and which might be regarded by the Magistrate as evidence, the person (unless he is an accused who has not given evidence) should be called or recalled for examination or cross-examination on the point on return to Court.
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> The less said on a view the better, but I do not wish to lay it down that comment by an advocate in the presence of the opposite party or his counsel would vitiate the proceedings.
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> The whole purpose of a view is to enable the Magistrate to follow the evidence given in Court and to help him to arrive at the truth.
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> But I do not think it safe to lay down any rigid rule for the conduct of a view. Something must be left to the Magistrate's discretion and so long as everything said or done is said or done openly in the presence of the accused and his counsel and is interpreted to the accused, if necessary, and so long as any new matter or new aspect arising during the view is

A tested by examination or cross-examination on return to Court there would be no irregularity in the trial nor would there be any ground for suspecting that justice did not appear to be done.

I would add that if counsel having been informed of the time and place of the view does not attend his non-attendance would no more vitiate
B the proceedings than would his non-attendance at an adjourned hearing in Court.

[10] In *Lee Boon Tuan v. PP* [1960] CLJU 52; [1960] 1 LNS 52; [1960] 1 MLJ 179; it was said:

It is not denied that the learned Magistrate was well within his right and
C it would indeed be his duty to visit the scene of the accident with a view to a proper appreciation of the evidence.

[11] In the case of *Manager, Tuborg (M) Sdn Bhd v. PP* [1990] 1 CLJ 790; [1990] 2 CLJ (Rep) 441; [1990] 2 MLJ 173 the learned judge wrote:

D A magistrate when conducting a summary trial is performing the function of judge and jury. Thus he has the same powers as a judge, sitting alone or with a jury, to view the scene under s. 218 of the Criminal Procedure Code (FMS Cap 6). This viewing of the *locus in quo* may either be, as described by Lord Denning in *Tameshwar & Anor v. R* [1957] AC 476, a simple view of an object or place or a view with witnesses in attendance
E and giving oral evidence or demonstration. In the first case, no evidence need be recorded but in the second one, the words spoken by the witness form part of the evidence and should have been recorded. At p. 484 of the judgment in *Tameshwar v. R* [1957] AC 476, Lord Denning said:

> It is very different when a witness demonstrates to the jury at the
F scene of a crime. By giving a demonstration, he gives evidence just as much as when in the witness-box he describes the place in words or refers to it on a plan. Such a demonstration on the spot is more effective than words can ever be, because it is more readily understood. It is more vivid, as the witness points to the very place where he stood. It is more dramatic, as he re-enacts the scene. He
G will not, as a rule, go stolidly to the spot without saying a word. To make it intelligible he will say at least 'I stood here' or 'I did this', and, unless held in check, he will start to give his evidence all over again as he remembers with advantage what things he did that day. But however much or however little the witness repeats his evidence or improves upon it; the fact remains that every
H demonstration by a witness is itself evidence in the case.

Murray-Aynsley CJ, in *Harban Singh v. R* [1954] MLJ 158 summed up the principle in his eight-line judgment as follows:

> In this case the magistrate had a 'view' in the absence of the appellant after the conclusion of the evidence. He then formed
I certain opinions on which his judgment seems to have been largely based. If the 'lay out' was of importance, I think evidence should have been produced on the subject. The defence would then have had an opportunity to deal with the matter.

[12] In the case of *PP v. Siti Aisyah & Anor And Another Case* [2019] 10 CLJ 660 the judge in the course of his decision had this to say:

> [129] Bearing in mind, I have allowed the request of the learned counsel to visit the scene where Kim Chol was allegedly murdered. On 24 October 2017, this court then adjourned to view the *locus in quo* of the incident, in the presence of court officials, learned prosecutors, learned defence counsel and both the accused persons. I have declared KLIA2 as open court. The site visit is important because the CCTV footage was taken from various cameras and various places. As the view at the scene crime was part of the court proceedings, this has given me, prosecutors and defence counsel a better understanding and a complete picture the location of the incident as shown in the CCTV at the airport and on how the incident took place on the day of the murder. The court visited more than 20 sites in the terminal. The visit took close to about three hours. Amongst the various location relevant to the criminal trial inspected are such as departure terminal, self check-in kiosk at level 3, Menara Medical Clinic at level 2 where Kim Chol had sought medical treatment, taxi stand, different toilets entered to by the accused persons after the attack, Bibik Heritage where first accused met Mr Chang, the different routes taken by the accused persons after the attack *etc*. Upon resuming, I have read out in open court the purpose of the site visit and all the locations visited at the scene. It is beyond dispute that the site inspection was important to assist the court in visualising the scene of the alleged crimes.

[13] In *Olivia Chong Oi Yun v. PP* [2020] 4 CLJ 246, Dr Hj Alwi bin Hj Abdul Wahab J opined:

> [42] I concede with the view expressed in the above authority (*Goh Ah San & Ors v. Rex* [1938] CLJU 21; [1938] 1 MLJ 95) that the conduct of *locus in quo* should be left at the discretion of the presiding trial judge so long as the interest of the appellant is safeguarded and if there is a new matter or new evidence that may arise at the scene, the parties are at liberty to examine and cross-examine the same on their return to the court room.

[14] See also the case of *Rex v. Lee Ah Phua & Ors* [1950] CLJU 74; [1950] 1 LNS 74; [1950] MLJ 54.

[15] In conclusion based on what has been adumbrated above the order of the Sessions Court Judge (SCJ) in refusing the application to visit the *locus in quo* is set aside and the application by the prosecution is allowed to enable the SCJ to follow the evidence given in court, to better visualise the scene of the offence and to help her to arrive at the truth so that justice is served. Having said this, the SCJ must also ensure that the accused persons are allowed to recall and cross examine any witnesses regarding any new evidence, if any, which emerges, emanates or ensues from the site visit.